Supreme Court, U.S.
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No. 97-1213

In The

Supreme Court of the United States

October Term, 1997

DARLENE JENKINS,

Petitioner,

vs.

GEORGE W. HEINTZ, BOWMAN, HEINTZ, BOSCIA & McPHEE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. THE COURT OF APPEALS CORRECTLY APPLIED THE BONA FIDE ERROR DEFENSE OF THE FAIR DEBT COLLECTION PRACTICES ACT 2

II. JENKINS' CONCEPTION OF THE BONA FIDE ERROR DEFENSE CONFLICTS WITH THE PLAIN LANGUAGE OF THE ACT, AND IS INCONSISTENT WITH CONGRESS' INTENTION TO TREAT ATTORNEY DEBT COLLECTORS THE SAME AS LAY DEBT COLLECTORS 6

III. JENKINS RELIES UPON DISTINGUISHABLE CASES AND THE DISTINGUISHABLE TRUTH IN LENDING ACT BONA FIDE ERROR DEFENSE TO CREATE A SUPPOSED INCONSISTENCY BETWEEN THE SEVENTH CIRCUIT DECISION AND ESTABLISHED LAW 12

CONCLUSION 15

TABLE OF AUTHORITIES

Page

Avila v. Rubin, 84 F.3d 222 (7th Cir. 1996) 9

Baker v. GC Services Corp., 677 F.2d 775 (9th Cir. 1982) 1, 12

Ducrest v. Alco Collections, Inc., 1998 WL 416738 (M.D. La. 7/9/96) 11

Heintz v. Jenkins, 514 U.S. 291 (1995) 7

Hubbard v. National Bond & Collection Ass'n, 126 B.R. 422 (D. Del.), *affirmed without opinion*, 947 F.2d 935 (3d Cir. 1991) 10, 11

Hulshizer v. Global Credit Services, Inc., 728 F.2d 1037 (8th Cir. 1984) 1, 12

Lindberg v. Transworld Systems, Inc., 846 F.Supp. 175 (D. Conn. 1994) 10, 11

Pipiles v. Credit Bureau of Lockport, Inc., 886 F.2d 22 (2d Cir. 1989) 1, 12

Russell v. Equifax, A.R.S., 74 F.3d 30 (2d Cir. 1996) 1

Smith v. Transworld Systems, 953 F.2d 1025 (6th Cir. 1992) 10

STATUTES INVOLVED

15 U.S.C. § 1640(c) 13

15 U.S.C. § 1692c 11

15 U.S.C. § 1692e(11) 4, 7, 14

15 U.S.C. § 1692f 7

TABLE OF AUTHORITIES – Continued

Page

15 U.S.C. § 1692g 14

15 U.S.C. § 1692k(c) 2, 5, 11, 13

OTHER AUTHORITIES

H.R. Rep. No. 405, 99th Cong., 2d Sess. 4 (1985) 8

SUMMARY OF ARGUMENT

Petitioner, Darlene Jenkins ("Jenkins"), argues that the decision of the Seventh Circuit conflicts with several Court of Appeals decisions on all three aspects of this case (Jenkins pet. at 6). Jenkins can only arrive at this conclusion with respect to the first argument by distorting the holding of the Seventh Circuit majority opinion. Contrary to Jenkins' argument, the majority does not contradict the many cases holding that the Fair Debt Collection Practices Act ("FDCPA") is generally a strict liability statute. *See, e.g., Russell v. Equifax A.R.S.*, 74 F.3d 30 (2d Cir. 1996).

Jenkins also artificially creates a "split" among the circuits with respect to the second and third arguments by erroneously comparing: a) cases which forbid the use of the bona fide error defense when the defendant claims ignorance of the legal requirements of specific provisions of the FDCPA or its Truth In Lending Act analog, such as *Pipiles v. Credit Bureau of Lockport, Inc.*, 886 F.2d 22 (2d Cir. 1989), *Baker v. GC Services*, 677 F.2d 775 (9th Cir. 1982) and *Hulshizer v. Global Credit Services, Inc.*, 728 F.2d 1037 (8th Cir. 1984); and b) this case, where the error does not concern the legal requirements of the FDCPA itself, but instead relates to a bona fide error by the debt collector with respect to the validity of the creditor's contractual claims against the debtor, notwithstanding the maintaining of adequate procedures for detecting such errors.

Because the issues in this case are distinct from the cases cited by Jenkins, there is no split among the circuits necessitating Supreme Court intervention.

ARGUMENT

I

THE COURT OF APPEALS CORRECTLY APPLIED THE BONA FIDE ERROR DEFENSE OF THE FAIR DEBT COLLECTION PRACTICES ACT.

Jenkins argues that the Seventh Circuit has become a judicial rogue, imposing an intent requirement upon the basic prohibitory provisions of the FDCPA (Jenkins pet. at 7-9). Jenkins' argument is entirely disingenuous. Although the majority opinion indeed describes the issues on occasion by suggesting that a plaintiff must prove an intentional violation, the "unintentional violation" element of the bona fide error defense (15 U.S.C. § 1692k(c)) puts the debt collector's intent to violate the FDCPA into play, along with the requirement of establishing adequate procedures to detect violations of the type asserted. The majority's analysis of the evidence and the issues demonstrates that it understood that it was the burden of respondents, George Heintz and Bowman, Heintz, Boscia & McPhee (collectively "Heintz"), to prove by a preponderance of the evidence: 1) its lack of intention to violate the FDCPA; and 2) the adequacy of Heintz' procedures for detecting errors of the kind alleged by Jenkins. Accordingly, Jenkins' claim that the Seventh Circuit has become a law unto itself is simply erroneous.

Despite the isolated incidents of imprecise language, the majority opinion demonstrates its proper application of the bona fide error defense. Immediately before quoting the language of 15 U.S.C. § 1692k(c), the majority states that a debt collector is "absolved if the violation

was unintentional and procedures were in place to prevent it" (App. 6). That is exactly how Heintz approached the motion for summary judgment based upon the bona fide error defense, and how the majority analyzed whether there were genuine issues of material fact as to either element of the defense.

In its motion for summary judgment, Heintz recognized its burden to establish that although the letter it sent to Jenkins' attorney sought to collect premiums for a type of force placed insurance which was not authorized by Jenkins' agreement with Heintz' client, Gainer Bank, this prima facie violation of the Act was not intentional.[1] The majority's analysis of the evidence (App. 7-14) is entirely consistent with Heintz' main contention: that Jenkins could come forward with no credible evidence that any Heintz attorney knew that the premiums for force placed insurance it was attempting to collect on behalf of Gainer Bank were not authorized by Jenkins' loan agreement. Given the absence of credible evidence that a Heintz attorney knew of the invalidity of the charges, there was no genuine issue of material fact as to whether Heintz intended to collect an amount not authorized by the contact or intentionally made a false representation of the character of Jenkins' debt to Gainer Bank. Interestingly, Jenkins' petition takes no issue with the majority's conclusion that the evidence did not raise a

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[1] Heintz has consistently stated that it is only conceding for the purposes of the motion for summary judgment that the force placed insurance premiums it sought to collect from Jenkins were not authorized by the contract.

genuine issue of material fact concerning Heintz' knowledge of the impropriety of the attempt to collect all of the force placed insurance premiums claimed by Gainer Bank.

The "bottom line" of the majority's analysis of the evidence of Heintz' alleged knowledge of the unauthorized nature of the charges it sought to collect is as follows (App. at 14):

> Jenkins' argument boils down to an assertion that given the information she uncovered in discovery . . . [Heintz] should have known that the bank was force placing unauthorized coverage. If the FDCPA assigned liability for negligent behavior, Jenkins' case might survive. But far too many assumptions must be made before it would be reasonable to infer [Heintz] actually knew, and then intentionally made a false representation as to the character of Jenkins' debt, as 15 U.S.C. § 1692 requires.

The plain language of the "false or misleading representations" section of the FDCPA (15 U.S.C. § 1692e) contains no mention of an intent requirement and, as Jenkins correctly points out, no court has imposed such a requirement (Pet. at 7). Obviously, then, the majority's discussion of the requirement of proving Heintz' knowledge of the falsity of the representation of the character of the debt only matters because Heintz asserted by affirmative defense that any violation it may have committed was unintentional.

In determining whether the Seventh Circuit's opinion comports with established precedent, this Court should look to the analysis employed and the substance of the

decision. While the majority does couch its decision in terms of an absence of a genuine issue of material fact with respect to Heintz' intention to violate the FDCPA, this must be read in the context of the raising of the bona fide error defense and the lack of a significant factual challenge to the adequacy of the procedures used by Heintz to detect errors of this kind.[2]

Ultimately, the majority evidences its understanding of the proper allocation of burden of proof (App. at 20-21):

> Section 1692k(c) requires that the debt collector show by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

This is exactly what the statute provides. The majority's analysis of the evidence of: 1) Heintz' procedures for verifying the validity of debts; and 2) Heintz' lack of knowledge of the impropriety of the charges claimed by Gainer Bank is entirely consistent with the plain language of section 1692k(c). Consequently, this Court should reject Jenkins' characterization of the majority opinion as requiring a plaintiff to prove intent to violate the FDCPA as part of her prima facie case.

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[2] Of course, Jenkins challenges the sufficiency of the procedures employed by Heintz for determining the *legal* validity of the amounts the bank claims are due and owing, but that is only relevant to Jenkins' second point. Jenkins does not challenge the *bona fides* of the detailed procedures followed by Heintz for verifying Gainer Bank's claims against debtors. App. at 20.

II

JENKINS' CONCEPTION OF THE BONA FIDE ERROR DEFENSE CONFLICTS WITH THE PLAIN LANGUAGE OF THE ACT, AND IS INCONSISTENT WITH CONGRESS' INTENTION TO TREAT ATTORNEY DEBT COLLECTORS THE SAME AS LAY DEBT COLLECTORS.

Jenkins begins section II of her petition with a gross oversimplification of the majority's holding with respect to the adequacy of procedures necessary for an attorney debt collector to satisfy the second element of the bona fide error defense.

> The Seventh Circuit also held that the bona fide error provision of the FDCPA does not require collection attorneys to exercise legal judgment while collecting debts through litigation. Pet. at 11.

More precisely, the question confronting the Seventh Circuit was whether an attorney debt collector may satisfy the "adequate procedures for detecting errors" element of the bona fide error defense without conducting a plenary review of the validity and collectibility of each charge claimed to be due and owing by the creditor client. As the majority held, if the collection attorney cannot assert the bona fide error defense without conducting a legal analysis of each of the creditor's claims, he is improperly held to a different standard than lay debt collectors and, effectively, cannot assert the defense against certain claims (App. 17-18):

> Pursuant to Jenkins' reading, the [FDCPA] would limit a debt collector to only collecting

> legally valid claims. But under this interpretation, there could not be a bona fide error for attempting to collect a claim not legally authorized by the contract with the debtor. So the bona fide error defense would be read out of the statute with respect to the violations of 15 U.S.C. §§ 1692e and 1692f alleged by Jenkins. "It is an elementary canon of construction that a statute should not be interpreted so as not [sic] to render one part inoperative" (citations omitted).

Jenkins, however, sees no harm in a double standard for attorneys asserting the bona fide error defense, despite her successful argument to this Court that the 1986 repeal of the blanket attorney exemption from liability was intended to level the playing field for attorney and lay collectors. *Heintz v. Jenkins*, 514 U.S. 291 (1995). She now shifts gears.

> Congress repealed the attorney exemption in the first place because Congress found that "bar associations have failed to fulfill their obligations underlying the premise of the attorney exemption" (citation to history omitted).
>
> * * *
>
> Under the Seventh Circuit's decision, attorneys are again free to use their status and power as attorneys for the benefit of creditors without assuming the responsibilities that Congress sought to impose upon them when it repealed the attorney exemption and that this Court solidified in *Heintz*. Pet. at 12-13.

This argument is pure misdirection. The repeal of the attorney exemption was motivated by the abuse of the blanket exemption granted to attorneys in the original

version of the FDCPA. Congress amended the FDCPA in response to attorneys who were marketing themselves to creditors by virtue of their ability to use the rough-and-tumble collection tactics forbidden to their lay competitors. H.R. Rule No. 405, *U.S. Code, Cong. and Admin. News,* 1754-55.

Jenkins' reference to the "responsibilities" of collection attorneys as including a pre-collection legal analysis far beyond what is required of lay collectors assumes that the repeal of the attorney exemption from liability meant that Congress intended to hold attorneys to a higher standard than lay collectors. Nothing in the plain language of the FDCPA supports such a result, and this Court's leveling of the playing field in *Heintz* contradicts such a notion.

Jenkins argues that the Seventh Circuit's decision will give creditors free reign to "pad" claims with unauthorized charges, then turn the matter over to a collection attorney, who supposedly may immunize himself from FDCPA liability via the bona fide error defense (Pet. at 13-14). This is absurd. The proposition that the majority opinion gives an attorney "free reign to pad" is inconsistent with what the bona fide error defense allows and how attorneys generally conduct their practices. An attorney debt collector thinking of attempting to collect on his client's "thrown-in" claims should be aware that if any claim proves meritless, he must be prepared to defend against a strict liability claim in which he will be liable for his opponent's attorney fees if he loses. He will bear the burden of showing that he had adequate procedures in place for determining that the claim was valid,

and he must also show that he had absolutely no knowledge that the amount he sought to collect was unauthorized. Attorneys being generally risk-averse, this threat of wholesale debt padding is pure alarmism.

Moreover, this argument flies in the face of the uncontested facts in this case. If Jenkins is trying to paint Heintz' conduct in this case as "looking the other way," she grossly distorts the record. Like most responsible attorneys, Heintz went to great pains to verify the amounts due and owing to his client. He had an officer of his client sign the functional equivalent of an affidavit verifying that he had reviewed Jenkins' file and that the charges sought by the bank were consistent with their agreement. Both the district court and the Seventh Circuit held that the FDCPA expects no more of an attorney debt collector.

Jenkins argues that the majority opinion conflicts with the Seventh Circuit's decision in *Avila v. Rubin*, 84 F.3d 822 (7th Cir. 1996). In *Avila*, a collection attorney was held to have sent out misleading dunning letters to debtors. The letters were deemed misleading because although they bore an attorney's signature, the attorney had delegated all responsibility for issuing the letters to nonattorney subordinates. The Seventh Circuit held that the unsophisticated consumer would be misled into believing that a letter bearing an attorney's signature was authored by an attorney familiar with the targeted debtor's rights and liabilities.

Jenkins tries to squeeze out an inconsistency where none is present. She argues that one Seventh Circuit decision (*Avila*) stands for the proposition that the FDCPA requires an attorney to exercise legal judgment

while acting as a debt collector, while the majority opinion in the instant case does not.

This argument fails because it ignores the critical difference between the contexts of the two cases. *Avila* involved a core, prohibitory provision of the FDCPA: the illegality of making false and misleading communications to the debtor. *Avila* does not stand for the proposition that a collection attorney *must* always independently analyze the legal merits of his client's claims. Instead, it stands for the proposition that if a communication with a debtor carries the false implication that an attorney has exercised professional judgment, the attorney has committed a basic violation of the statute by misleading the unsophisticated consumer. Unlike the instant case, the issue of bona fide error never enters into such a case, nor could it, as Heintz will demonstrate below.

Instead of creating a split among the lower courts, the majority opinion is entirely consistent with several reported decisions concerning the basic requirements for asserting the bona fide error defense. In both *Smith v. Transworld Systems,* 953 F.2d 1025 (6th Cir. 1992), and *Lindberg v. Transworld Systems, Inc.,* 846 F.Supp. 175 (D. Conn. 1994), it was held that the FDCPA does not require that the creditor conduct an independent investigation of the debt before attempting to collect. In *Lindberg,* for example, the collection agency attempted to collect an amount which, according to the plaintiff, was not validly due and owing because the statute of limitations had run. The court affirmed summary judgment for the defendant.

In *Hubbard v. National Bond & Collection Ass'n,* 126 B.R. 422 (D. Del.), *affirmed without opinion,* 947 F.2d 935

(3d Cir. 1991), the court held that the "false representation of the character of the debt" provision of 15 U.S.C. § 1692c did not apply to an unintentional violation. The court bolstered its characterization by referring to the bona fide error defense of 15 U.S.C. § 1692k. More specifically, both *Lindberg* and *Hubbard* state that a debt collector need not investigate the "background" of the debt before instigating collection proceedings.

Also, in *Ducrest v. Alco Collections, Inc.*, 1998 WL 416738 (M.D. La. 7/9/96), the court stated as follows with respect to a collector's obligations (Op. at 3):

> The FDCPA does not require an independent investigation of the information provided by clients when a debt collector tries to collect a debt, nor does it require the debt collector to dispute the creditor's construction of a contract.

Here, the issue is strictly a construction of the bona fide error defense in the context of the term "debt collector". After the 1986 amendments, the FDCPA does not differentiate substantively between lay and attorney debt collectors. Accordingly, the majority's analysis of the adequacy of Heintz' procedures without reference to their professional status is consistent with both the letter and spirit of the statute.

III

JENKINS RELIES UPON DISTINGUISHABLE CASES AND THE DISTINGUISHABLE TRUTH IN LENDING ACT BONA FIDE ERROR DEFENSE TO CREATE A SUPPOSED INCONSISTENCY BETWEEN THE SEVENTH CIRCUIT DECISION AND ESTABLISHED LAW.

Jenkins begins Argument III much as she began Argument II – with the exaggerated claim that the FDCPA does not absolve debt collectors for "errors of legal judgment"(Pet. at 20-21). She cites the Truth In Lending Act's similar bona fide error defense, which has been construed as not allowing "errors of law" as bona fide errors. She also cites three FDCPA cases, *Pipiles v. Credit Bureau of Lockport, Inc.*, 886 F.2d 22 (2d Cir. 1989), *Baker v. GC Services*, 677 F.2d 775 (9th Cir. 1982) and *Hulshizer v. Global Credit Services, Inc.*, 728 F.2d 1037 (8th Cir. 1984), for the proposition that a collector cannot claim bona fide error for an error in legal judgment.

These cases cannot be validly compared to the instant case. All of these cases involve violations of specific provisions of the FDCPA by a debt collector, who then claimed bona fide error based upon legal advice or misinterpretation concerning the requirements of the FDCPA. Such is not the case here. The "legal error" here does not concern what the FDCPA itself requires; it concerns only an error with respect to the legal merits of the creditor's claim, and whether the attorney/collector was legitimately unaware of the invalidity under the contract of one of the charges he was seeking to collect.

This is an important distinction. If a debt collector could escape liability by asserting that he did now know

that he had to comply with the specific requirements of the Act, such as the limitations with respect to communications (§ 1692c) or the debt validation requirement (§ 1692g), the provisions could be rendered inoperative. However, with respect to attempting to collect a debt not authorized by the contract or law, an error of that kind does not come about because of ignorance concerning the prohibitory provisions of the Act. Instead, the error arises out of a mistake with respect to the amount shown or to the scope of the creditor's rights under the contract or the law. The integrity of the regulations contained in the Act is not threatened by allowing that kind of "legal error" to be considered a bona fide error under § 1692k(c) in the appropriate case.

Finally, Jenkins argues that the majority opinion allows the bona fide error defense of the FDCPA to be construed differently than the parallel defense from TILA. The majority held that the bona fide error defense of TILA (15 U.S.C. § 1640(c)), is distinguishable from the FDCPA bona fide error defense because it specifically excludes "errors of legal judgment with respect to a person's obligations [under TILA]" from the defense. App. 15, n.7.

Not only is this distinction correct as a matter of statutory interpretation, since Congress could certainly have included this same limitation in the FDCPA bona fide error defense had it meant to make the provisions identical, but it comports with the different natures of the two statutes. TILA is a "full disclosure" statute. The provisions and accompanying regulations set forth in detail what a consumer/debtor must be told before borrowing or engaging in a retail credit transaction.

The FDCPA, while containing elements of disclosure (the 30-day debt validation notice (15 U.S.C. § 1692g), the mini-Miranda warning (15 U.S.C. § 1692e(11)), is more of a prohibitory statute. The main thrust of FDCPA is to set forth broad categories of prohibited debt collection activity, leaving it to the courts to determine whether a particular form of conduct falls within the broad prohibitions enumerated.

This distinction in purpose between the two statutes mandates a different application of their bona fide error defenses. Under TILA, it would defeat the purpose of the detailed statutory/regulatory scheme if a mandatory disclosure were not made, but the lender/retailer could simply claim he did not know that disclosure was required. That it is why it is explicitly set forth that an error with respect to TILA's requirements is not a defense.

Under the FDCPA, on the other hand, given the broad prohibitory language of its provisions, particularly those provisions at issue in this case (using an "unfair or unconscionable means to collect a debt"; any false representation of the "character" of any debt), the defense should be more liberally applied than in TILA. As set forth above, while an error regarding a specific, technical requirement of FDCPA may not be excused by the bona fide error defense, any error relating to the legal niceties of the creditor's claim should fall directly within the scope of the bona fide error defense, so long as the error was unintentional and detailed procedures for detecting errors were in place.

Finally, as set forth above, the error in this case does not concern the requirements of the FDCPA itself. Heintz is not contending that they committed a bona fide error of legal judgment with respect to the Act's mandated disclosures or broad categories of prohibited activity. Their claim is that they were legitimately unaware that the contract between Gainer Bank and Jenkins did not allow them to seek all charges for force placed insurance. Because of that error, which does not pertain to the requirements of the Act *as such*, they may have unintentionally sought collection of an amount not authorized by the contract or law. That is the type of bona fide error that the Act was intended to cover, regardless of the professional status of the collector.

CONCLUSION

For these reasons, respondents, George W. Heintz and Bowman, Heintz, Boscia & McPhee, respectfully request that this Court deny the petition for certiorari.

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